CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3270

Heard in Montreal, Thursday, 13 June 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

The assessment of forty (40) demerits to G.A. King of Edmonton, Alberta for violation of CROR rule 429 while working as conductor-pilot on O 485 51 05 on August 5, 2000.

EX PARTE STATEMENT OF ISSUE:

On August 5, 2000 Glen King was working as conductor-pilot on a Loram rail grinder operating on the Edson sub at Wabamun, Alberta. During this tour of duty, the movement passed signal 441.N at Wabamun which was displaying a stop indication, resulting in a CROR rule violation. Mr. King was assessed forty (40) demerits following an investigation.

The Union contends that there are several mitigating factors which the Company has failed to recognize or consider in the assessment of discipline to Mr. King. Accordingly, the Union submits that the discipline assessed to Mr. King is excessive and should be mitigated to a lesser degree.

The Union further contends that the Company failed to provide a fair and impartial investigation of this matter and that the resulting discipline is invalid and should be expunged and Glen King's record be made whole.

The Company disagrees.

FOR THE COUNCIL:

(SGD.) B. R. BOECHLER
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:

S. Blackmore – Manager, Human Resources, Edmonton
B. Kalin – Superintendent Operations, Edmonton
A. Giroux – Counsel, Montreal

And on behalf of the Council:

M. Church – Counsel, Toronto
B. R. Boechler – Vice-General Chairperson, Edmonton
G. A. King – Grievor

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied that the grievor was deserving of a measure of discipline for his failure, when operating as pilot on a Loram rail grinder, to ensure that his movement stopped short of signal 441N at Wabamun on August 5, 2000. There are, however, substantial mitigating factors to be taken into account.

Firstly, the material before the Arbitrator confirms that the Loram equipment, which does not belong to the Company, was somewhat defective in that it had only 65% of its braking capacity. Additionally, the operator of the Loram unit at the time of the rule 429 infraction was relatively inexperienced in the operation of that equipment.

In the Arbitrator's view the facts in the instant case are difficult to distinguish from those in **CROA 3238**, in which the assessment of twenty demerit marks to another conductor functioning as pilot on a Loram rail grinder was similarly involved in a violation of CROR rule 429. When regard is had to the fact that the grievor, a long service employee, had been discipline free for some seven years prior to the incident in question, and had no demerits on his record at the time, I am satisfied that the assessment of twenty demerits is more appropriate in the circumstances.

The Arbitrator cannot sustain the separate issue raised by the Council, concerning its allegation that the grievor was denied a fair and impartial investigation. It appears that the objection is based principally on the investigating officer's refusal of the request of the union representative to be given the opportunity to put questions to the supervisor and the operator of the Loram train. There is, in the Arbitrator's view, nothing within the language of the collective agreement that would require the Company to have called those individuals as witnesses at its investigation. In that regard article 117.2 of the collective agreement reads as follows:

> **117.2** Employees may have an accredited representative appear with them at investigations, will have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation.

While there may be some circumstances in which the Company's refusal to seek to obtain a statement from a material witness could place the employer at peril of not providing a fair and impartial investigation, the present wording of article 117 of the collective agreement does not place upon the employer a burden to call as witnesses all persons who might provide statements that are favourable to the employee being investigated, or provide mitigation of his or her responsibility. In addition, the Council retains the ability to call such witnesses at an eventual arbitration, should it grieve the discipline assessed. (See, generally, **CROA 1858, 2073, 2280** and **3202**.)

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the forty demerits assessed against Mr. King be reduced to twenty demerits for the violation of CROR rule 429 in the circumstances which obtained at Wabamun, Alberta on August 5, 2002.

June 14, 2002

(signed) MICHEL G. PICHER
ARBITRATOR